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Africa: Harmonising competition policy under the AfCFTA

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ABSTRACT

This article examines the process of harmonisation of competition law and policy in Africa in the context of economic integration under the African Continental Free Trade Agreement (AfCFTA). The article undertakes a comparative examination of the various stages of development of domestic competition laws and authorities across Africa. It identifies the challenge of the different and overlapping membership of the Regional Economic Communities (RECs), as well as the diversity among the regional competition policy frameworks that have developed on the African continent. The article concludes by discussing the various options and recommendations for harmonising competition policy and integrating competition law in the context of the AfCFTA under African Union law.

Cet article examine le processus d'harmonisation du droit et de la politique de la concurrence en Afrique dans le contexte de l'intégration économique par l'accord de libre-échange continental africain (ALEAC). L'article entreprend un examen comparatif des différents stades de développement des lois et autorités nationales de la concurrence en Afrique. Il met en lumière le défi que représentent les différences et les chevauchements existants entre les Communautés économiques régionales (CER), ainsi que la diversité des cadres régionaux de politique de la concurrence qui se sont développés sur le continent africain. L'article se termine par une discussion des différentes options et recommandations pour l'harmonisation de la politique de la concurrence et l'intégration du droit de la concurrence dans le contexte de l'accord de libre-échange entre l'Afrique et l'Union africaine.

I. Introduction

1. The African Continental Free Trade Agreement (AfCFTA) holds the potential to boost intra-African trade by 52.3% through eliminating import duties—and if non-tariff barriers are also reduced, it will double the projected amount.¹ Deeper integration under the African Union (AU), through reducing both tariff and non-tariff barriers, will allow firms to transcend national borders and can serve as the foundation for developing regional value chains. However, cross-border trade also provides an opportunity for cross border anti-competitive business practices in Africa to emerge. If competition rules lag behind economic liberalisation process, the benefits of integration can be undermined through the foreclosure of markets by private companies. Market forces, when left on their own through the liberalisation process, do not automatically produce the desired efficiencies in the economy and foster sustainable development. Firms can abuse their dominant market position through predatory behaviour to eliminate local competition, or through forming cartels to fix higher prices and other market-sharing agreements. If no safeguards exist to prevent anti-competitive practices, no fundamental change will occur in the incentives facing firms to improve their overall behaviour and performance.²

2. There is therefore considerable merit in developing modalities under the African Union for continental co-operation in relation to anti-competitive practices affecting the interests of several members.³ A prerequisite set of rules is required on how to engage in commercial and industrial activities that are conducive and responsive to efficient marketplace behaviour. Competition law is designed to enhance the economic welfare of people by, among other things, breaking down private barriers to commerce and preventing the creation and misuse of corporate power through cartels and monopolistic strategies.⁴ Within the EU, effective competition has both increased market integration and boosted the competitiveness of European companies in the single market and globally.⁵

1 The 2019 African Union Handbook, 23.

2 WTO Secretariat, Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth (1998), Working Group on the Interaction between Trade and Competition Policy WT/WGTCP/W/80, 8.

3 T. Hartzenberg, Cooperation on competition in the AfCFTA, tralacBlog (accessed 22/09/2019 at: www.tralac.org/blog/article/14078-cooperation-on-competition-in-the-afcfta.html).

4 E. M. Fox, Toward World Antitrust and Market Access (1997) 91 *AJIL* 1.

5 European Court of Auditors, 2018.

3. However, trade and competition are often seen through separate policy lenses. Traditionally, trade law has involved public restraints of trade; antitrust or competition law has concerned private restraints. Trade law, by definition, is internationally oriented, whereas competition law has national roots.⁶ Trade policy fosters these goals primarily through the reduction of government-imposed barriers to international commerce, while competition policy addresses principally anti-competitive practices of enterprises that impede the efficient functioning of markets. Yet neither instrument is likely to be fully successful in the absence of the other.⁷

4. The AfCFTA negotiations have also separated competition from trade policy. The Phase I negotiations covered trade integration while the ongoing Phase II negotiating issues include the Competition Protocol. Yet the African integration process needs a strong guiding role in ensuring that competition policy and trade liberalisation complement each other in promoting efficiency, consumer welfare, growth and development. In Africa, as in many developing countries, governments have had large government-owned sectors, various government-granted exclusive economic privileges, a tradition of cartels, and general lack of transparency regarding market access and the opportunities for foreign businesses to challenge incumbents. A regional integration policy needs to take account of the probability that the removal of border barriers will fuel the incentives of governments and firms to find other ways to re-erect barriers and protect their historical advantage—through anti-competitive business practices.

5. The challenge for the AU institutions and instruments is to address the linkages between trade and competition that will influence the pattern of African economic integration. This will require providing the legal clarity and consistency to harmonise continent-wide competition principles and enforcement. Yet with the necessary political will, the AU is uniquely positioned to accommodate the sovereignty of the State Parties, the variable geometry and overlapping membership in the RECs.

6. The article is set out as follows: Section II looks at the process of economic integration in Africa under the AfCFTA. Section III sets out the issue of overlapping membership and variable geometry among the domestic competition regimes and within the RECs. Section IV concludes with an analysis of the different options and recommendations for promoting harmonising competition principles under the African Union.

II. The context of economic integration in Africa

7. Compared with norm development in the human rights sphere, development in the business and economic sphere in Africa has been slow and with lesser overall impact.⁸ The economic and business integration effort in Africa began in earnest with the adoption in 1991 of the Treaty Establishing the African Economic Community (Abuja Treaty).⁹ The Abuja Treaty aims to unify the continent's economy through the establishment of free trade and monetary union, leading to the establishment of the African Economic Community (AEC).¹⁰ In March 2018, the African Union Assembly Summit adopted the AfCFTA Agreement, the Protocol on Trade in Goods, the Protocol on Trade in Services, and the Protocol on Rules and Procedures on the Settlement of Disputes. There is indication that trading under the AfCFTA Agreement will begin on 1 July 2020, while a draft Competition Protocol¹¹ is expected in January 2021.¹²

8. The AfCFTA formally recognises the existing achievements of integration through FTAs and customs unions, and positions the RECs as the building blocks that will lead to the establishment of a continental trading community.¹³ The AfCFTA takes a two-tier approach: while AfCFTA law shall prevail in event of conflict or inconsistency with a regional agreement, State Parties that have attained a higher level of integration shall maintain such higher levels as they are seen as beneficial. More explicitly, Article 19 recognises variable geometry among the RECs, providing for differentiated integration.¹⁴ Variable geometry allows for progression in cooperation among groups within the Community for wider integration schemes in various fields and at different speeds. It is also a principle of some of the RECs, such as the Tripartite Free Trade Area Agreement¹⁵ and the East African Community (EAC) Treaty.¹⁶

8 A. Olufemi, *African Union Law: The Emergence of a Sui Generis Legal Order* (Routledge, 2017) (n. 4) 65.

9 The Abuja Treaty entered into force on 12 May 1994.

10 The Treaty Establishing the African Economic Community, Article 4(d) Objectives. Under Article 6, the Community is established in six stages beginning with the creation of regional blocs. Successive stages include the establishment of free trade areas and customs unions in each REC, the creation of a continental customs union, the creation of an African common market and the establishment of an African economic monetary union and a parliament.

11 Along with protocols on investment, and intellectual property rights.

12 The AU Assembly requested African Union Ministers to submit the draft legal texts to the January 2021 Session of the Assembly for adoption through the Specialised Technical Committee on Justice and Legal Affairs, Key Decisions of the 32nd Ordinary Session of the Assembly of the African Union (February 2019), https://archives.au.int/bitstream/handle/123456789/2754/2019_February%20Summit_keyDecision_E.pdf?sequence=1&isAllowed=y.

13 The African Continental Free Trade Agreement, Preamble.

14 The African Continental Free Trade Agreement, Article 19.

15 The Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community, Article 6.

16 The East African Community Treaty, Article 7(1)(e).

6 E. M. Fox, *Toward World Antitrust and Market Access* (n. 7) 3.

7 See: WTO Secretariat Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth, Working Group on the Interaction between Trade and Competition Policy WT/WGTCP/W/80, 18 September 1998.

III. Variable geometry and overlapping membership

9. Although the RECs are the designated building blocks under the AfCFTA, the State Parties are individually responsible for implementing the AfCFTA obligations. The harmonisation challenge here is to reconcile the overlapping membership of diverse countries in different RECs and customs unions, which can lead to legal conflicts where there is also variable geometry between them. Table 1 highlights the diversity in establishing competition legislation and competition authorities at the domestic level. It also indicates the multiplicity and overlapping memberships across the African continent. It suggests a potential for conflicts of law and implementation to emerge, should there be differences in the applicable regional competition laws for those countries falling under more than one REC.

10. To address cross-border anti-competitive practices effectively, the individual countries of Africa not only require a strong national competition law and authority, but they must also cooperate with each other based on trust and shared competition principles. Yet countries in Africa are at four broad different stages of competition law and policy implementation: 1) The 25 countries which have both a competition law in force and an operational competition authority;¹⁷ 2) The eight countries which have enacted competition law but have not yet established a competition authority;¹⁸ 3) The four countries where the preparation of competition legislation has reached a very advanced stage;¹⁹ and 4) The 18 countries which do not have a competition law or are still at early stages

17 Algeria, Botswana, Burkina Faso, Cameroon, DRC, Egypt, Ethiopia, Gambia, Ivory Coast, Kenya, Liberia, Madagascar, Malawi, Mauritius, Morocco, Namibia, Nigeria, Senegal, Seychelles, South Africa, eSwatini (formerly Swaziland), Sudan, Tanzania, Zambia and Zimbabwe.

18 Angola, Burundi, Comoros, Cape Verde, Djibouti, Mali, Mozambique, and Rwanda

19 Lesotho, Niger, Togo, and Uganda.

Table 1. African country membership in the RECs

Number of Countries	Country	National Competition Legislation	National Competition Authority	African Regional Economic Community
1	Algeria	Yes	Yes	
2	Angola	Yes	No	SADC, ECCAS
3	Benin	No	No	ECOWAS, WAEMU
4	Botswana	Yes	Yes	SACU, SADC
5	Burkina Faso	Yes	Yes	ECOWAS, WAEMU
6	Burundi	Yes	No	COMESA, EAC, ECCAS
7	Cabo Verde	Yes	No	ECOWAS
8	Cameroon	Yes	Yes	CEMAC, ECCAS
9	Central African Republic	No	No	CEMAC, ECCAS
10	Chad	No	No	CEMAC, ECCAS
11	Comoros	Yes	No	COMESA
12	Congo (Brazzaville)	No	No	CEMAC, ECCAS
13	Congo (Democratic Republic of)	Yes	Yes	COMESA, SADC, ECCAS
14	Côte d'Ivoire	Yes	Yes	ECOWAS, WAEMU
15	Djibouti	Yes	No	COMESA
16	Egypt	Yes	Yes	COMESA
17	Equatorial Guinea	No	No	CEMAC, ECCAS
18	Eritrea	No	No	COMESA
19	Eswatini (formerly Swaziland)	Yes	Yes	COMESA, SACU, SADC
20	Ethiopia	Yes	Yes	COMESA
21	Gabon	No	No	CEMAC, ECCAS
22	Gambia (The)	Yes	Yes	ECOWAS
23	Ghana	No	No	ECOWAS

24	Guinea	No	No	ECOWAS
25	Guinea Bissau	No	No	ECOWAS, WAEMU
26	Kenya	Yes	Yes	COMESA, EAC
27	Lesotho	Draft	No	SACU, SADC
28	Liberia	Yes	Yes	ECOWAS
29	Libya	No	No	COMESA
30	Madagascar	Yes	Yes	COMESA, SADC
31	Malawi	Yes	Yes	COMESA, SADC
32	Mali	Yes	No	ECOWAS, WAEMU
33	Mauritania	No	No	
34	Mauritius	Yes	Yes	COMESA, SADC
35	Morocco	Yes	Yes	
36	Mozambique	Yes	No	SADC
37	Namibia	Yes	Yes	SACU, SADC
38	Niger	Draft	No	ECOWAS
39	Nigeria	Yes	Yes	ECOWAS
40	Réunion	No	No	
41	Rwanda	Yes	No	COMESA, EAC
42	São Tomé and Príncipe	No	No	ECCAS
43	Senegal	Yes	Yes	ECOWAS
44	Seychelles	Yes	Yes	COMESA, SADC
45	Sierra Leone	No	No	ECOWAS
46	Somalia	No	No	
47	South Africa	Yes	Yes	SACU, SADC
48	Sudan	Yes	No	COMESA
49	South Sudan	No	No	EAC
50	Tanzania	Yes	Yes	EAC, SADC
51	Togo	Draft	No	ECOWAS, WAEMU
52	Uganda	Draft	No	EAC
53	Western Sahara	No	No	
54	Zambia	Yes	Yes	COMESA, SADC
55	Zimbabwe	Yes	Yes	COMESA, SADC

of preparation of competition legislation.²⁰ This has implications for an AfCFTA vision of a continental competition regime as well as how to achieve it.

1. Variable geometry in REC and Customs Unions' competition regimes

11. While some RECs have established supreme regional competition authorities, others operate through a cooperation framework with few competition requirements for their members. There is considerable variation across RECs, in terms of level of ambition and institutional arrangements.

²⁰ Benin, Central African Republic, Chad, Congo (Brazzaville), Equatorial Guinea, Eritrea, Gabon, Ghana, Guinea, Guinea Bissau, Libya, Mauritania, Réunion, São Tomé and Príncipe, Sierra Leone, Somalia, South Sudan, and Western Sahara.

1.1 Common Market for Eastern and Southern Africa (COMESA)*

12. Among all the regional trade agreements in Africa, COMESA has the largest membership with nineteen members²¹ and has the most established and developed regional competition authority in Africa, based on the EU competition regime. The rules encompass government subsidies, private anti-competitive practices and anti-dumping rules. Article 55 empowers the Council of Minister of the Common Market to make regulations on competition. The 2004 COMESA Competition Regulations and Competition Rules established a merger control regime for cross-border cases and to address other competition law and consumer protection matters.²² Two competition bodies have been established for the purposes of enforcing competition law in the Common Market.²³

13. The COMESA competition regulations are superior to national competition laws and are directly applicable in COMESA Member States. COMESA introduces a regional competition regime to be implemented at both national and regional level depending on whether an anti-competitive practice has cross-border effects. Almost all the COMESA Member States have adopted competition laws in the last few years. The regional competition rules recognise that closer cooperation between COMESA Member States in the form of notification, exchange of information, coordination of actions and consultations among Member States should be encouraged. Since the Commission became operational in 2013, it has decided over 100 merger cases.²⁴ Since 2017, it has investigated ten cases of anti-competitive practices or requests for authorisations, issuing decisions for six to date. Of these three identified anti-competitive concerns in relation to restrictions to passive pricing and the duration of non-compete clauses,²⁵ and one addressed harmful vertical restraints and fixed price and profit margins.²⁶

* The Treaty Establishing the Common Market for Eastern and Southern Africa was signed in 1994 as a successor to the 1981 Preferential Trade Area for Eastern and Southern Africa, I.

21 Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

22 The COMESA Competition Regulations and Competition Rules Article 5 states: “Member States shall take all appropriate measures (...) to ensure fulfilment of the obligations arising out of these Regulations or resulting from action taken by the [COMESA Competition] Commission under these Regulations.”

23 The COMESA Competition Commission (CCC) became operational in January 2013, and is responsible for investigating anti-competitive practices and reviewing merger control filings; The Board of Commissioners makes rulings, imposes remedies and hears appeals against decisions of the CCC.

24 African Competition Law Developments in 2018 and the outlook for 2019 (accessed 27/09/2019 at: <https://www.lexafrika.com/competition-law-outlook-for-2019>).

25 Decision/RBP/5/2018, Distribution Agreement between the Wirtgen Group and the Motor & Engineering Company of Ethiopia Limited S.C; Decision/RBP/4/2018, Distribution Agreement between Wirtgen Group and Sodirex SA, Madagascar; Decision/RBP/2/2018, Distribution Agreement between Wirtgen Group and UMCL Ltd of Mauritius.

26 Decision/RBP/1/2018, Distribution Agreements between The Coca-Cola Company and its Distributors in Ethiopia and Comoros.

1.2 East African Community (EAC)

14. The Treaty for the Establishment of the EAC²⁷ entered into force in July 2000. A Customs Union was created in 2005,²⁸ followed by the EAC Common Market Protocol in July 2010.²⁹ There is compatibility with the COMESA because the Protocol on the Establishment of an EAC Customs Union contains competition provisions that are in harmony with the COMESA competition regulations, both in content and coverage.³⁰

15. The EAC Competition Act was enacted in 2006 to promote and protect fair competition in the Community, to provide for consumer welfare, to establish the EAC Competition Authority (EACCA) and for related matters.³¹ The EAC Competition Act provides that the EACCA shall have all powers, express and implied necessary for and conducive to the implementation and enforcement of the EAC Competition Law.³² The EACCA is an independent organ of EAC but subject to judicial review by the East African Court of Justice.³³ The focus of the EACCA has been less on mergers but on investigating firms and trade associations engaged in malpractices and the exploitation of consumers through price fixing.³⁴ No cases have been decided.

16. Among the EAC members' competition regimes, four out of the six members have a national competition law, while Uganda and South Sudan have draft competition bills pending. Emerging harmonising challenges include its overlap with the existing Tanzanian and Kenyan national regulators, as well as with the COMESA Commission. Nevertheless, the compatibility of the two competition regimes in these two RECs already provides a harmonising dynamic under the framework of the AfCFTA.

1.3 Economic Community of West African States (ECOWAS)

17. ECOWAS is a regional grouping of fifteen Member States³⁵ founded in 1975 via the Treaty of Lagos,³⁶ to promote economic integration. ECOWAS introduced competition legislation in 2008 through the ECOWAS Supplementary Act on the “Adoption of Community

27 The Treaty for the Establishment of the East African Community (EAC). The EAC comprises six Partner States: The Republic of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda.

28 The Protocol on the establishment of the East African Customs Union took effect in 2010.

29 Ibid.

30 Ibid., Article 21.

31 The East African Community Competition Act, 2006, Section 42.

32 Ibid.

33 Ibid., Sections 44 and 46.

34 <https://www.lexafrika.com/competition-law-outlook-for-2019>.

35 Member countries making up ECOWAS are Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

36 Economic Community of West African States (ECOWAS) Revised Treaty (1993).

Competition Rules and the modalities of their application within ECOWAS.”³⁷ The objectives of the Supplementary Act include prohibiting any anti-competitive business conduct that prevents, restricts or distorts competition at regional level and ensuring consumers’ welfare. It also provides for the establishment of the ECOWAS Competition Authority to implement Community Standards Competition rules and regulations within the ECOWAS Community.³⁸

18. There is considerable variable geometry between the ECOWAS and the COMESA and EAC competition regimes. There are several ECOWAS members that do not yet possess a competition law or authority, such as Guinea, Sierra Leone and Niger. Yet ECOWAS also includes the eight members of the sub-regional bloc West African Economic and Monetary Union (WAEMU), which has a stronger competition regime based on regional competition law and a supranational competition authority (discussed below).

1.4 West African Economic and Monetary Union (WAEMU)

19. The WAEMU was established in 1994 with eight Member States, who all have membership of ECOWAS.³⁹ Unlike ECOWAS, the fundamental principles of WAEMU include the primacy of community law over national law along with the direct and immediate applicability of community law.⁴⁰ WAEMU has a common regional competition policy under Articles 88 to 90 of the WAEMU Treaty.⁴¹ The WAEMU Court of Justice has stated that competition authorities of Member States do not have competence to regulate and monitor competition.⁴² In 2002, WAEMU adopted regulations on anti-competitive practices; on procedures governing cartels and abuse of dominant position; and on State aid.⁴³ In addition, a directive was adopted on cooperation between the Commission and the competition bodies of Member States for the application of Articles 88, 89 and 90 of the WAEMU Treaty. WAEMU also operates a voluntary merger filing regime, although the competition authority has made a relatively small number of merger decisions.

20. While WAEMU has a strong EU type competition regime, along the lines of COMESA and EAC, it is not well integrated with the other RECs, including in its overlapping membership with ECOWAS. Harmonisation is, however, strong within WAEMU’s centralised competition regime, despite variations in competition among the members. For example, Benin and Guinea Bissau do not have national competition laws but they approved the WAEMU Treaty and hence the competition provisions thereof.⁴⁴ These countries still address anti-competitive practices in a harmonised manner, but by reporting these cases to the WAEMU Commission.

1.5 Southern African Customs Union (SACU)

21. SACU was established in 1910 and is the oldest customs union in the world.⁴⁵ The revised SACU Agreement of 2002 came into force on 15 July 2004.⁴⁶ The Agreement contains only two Articles on competition: Article 40 expresses the agreement of Member States that there should be competition policies in each Member State and obliges the Member States to co-operate with each other on enforcement of competition laws and regulations. Article 41 obliges the Council of SACU to develop policies and instruments to address unfair trade practices between Member States. Such policies and measures are to be annexed to the SACU Agreement.

22. The SACU members have widely divergent territory size, development levels, and size of national firms. Its members have not agreed to harmonise their competition policies, or address cross-border anti-competitive practices occurring within the SACU. Rather, the SACU Treaty defers to the Member States for effective application of their national competition laws. The SACU Council has the authority to identify and address unfair trade practices by policies and instruments through establishing Technical Liaison Committees.⁴⁷ However, the role and duties of Member States in giving legal effect to these policies are not specified. Several of SACU’s members are members of SADC.

³⁷ ECOWAS Supplementary Act A/SA.1/06/08 of 19 December 2008 on the Adoption of Community Competition Rules and the modalities of their application within ECOWAS.

³⁸ Article 11(2) of the Supplementary Act empowers the ERCA to approve mergers, acquisitions, or other business combinations prohibited under Article 7 of the Supplementary Act, if such transaction is in the public interest.

³⁹ Benin, Burkina Faso, Côte d’Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

⁴⁰ Article 6 of UEMOA Treaty.

⁴¹ Treaty Establishing the West African Economic and Monetary Union (WAEMU) 1994.

⁴² UNCTAD, Voluntary Peer Review of Competition Policy: West African Economic and Monetary Union, Benin and Senegal Overview, UNCTAD/DITC/CLP/2007/1 (Overview), (New York and Geneva, 2007) p. 11.

⁴³ Regulation No. 2/2002/CM/UEMOA of 23 May 2002 on anti-competitive practices within the WAEMU.

⁴⁴ In 2015, Niger validated a new Competition and Consumer Protection Law that replaces a 1992 law that was never fully operational. Togo’s own competition law was replaced by the WAEMU community law on competition, which took effect on 1 January 2003. A National Competition and Consumption Commission became operational in Togo in 2006.

⁴⁵ SACU Member States include Botswana, Lesotho, Namibia, South Africa, and Swaziland (<http://www.sacu.int>).

⁴⁶ The 2002 Southern African Customs Union (SACU) Agreement

⁴⁷ Article 12 of the Treaty provides Technical Liaison Committees.

1.6 Southern African Development Community (SADC)

23. The Southern African Development Community (SADC)⁴⁸ was established in August 1992.⁴⁹ The SADC Trade Protocol⁵⁰ requires Member States to implement measures within the Community that prohibit unfair business practices and promote competition. All SADC Member States are also bound by the 2009 Declaration on Regional Cooperation and Consumer Policies,⁵¹ to make cooperation effective, and take the required steps to adopt and implement the necessary domestic competition and consumer protection laws in their respective countries.

24. The regional approach adopted by SADC differs from the EU supranational approach adopted by COMESA, EAC and WAEMU. The SADC competition policy focuses on cooperation between its members, who are encouraged to implement effective competition laws domestically. However, discussions have started to establish a regional competition framework by 2020, which if based on the same competition principles as COMESA and the EAC, could promote AU wide harmonised competition policies.

1.7 Central African Economic and Monetary Community (CEMAC)

25. The Treaty establishing the Economic and Customs Union of Central Africa advocates finding solutions to phase out restrictive business practices between Member States.⁵² The CEMAC competition regime includes laws and institutions, but is far less established than WAEMU or COMESA. The 1999 Regulation on anti-competitive business practices⁵³ prohibits any practice likely to constitute an obstacle to the free play of competition and in particular cartels, abuse of dominance, and concentrations that significantly reduce competition. The CEMAC competition regulation establishes the CEMAC Commission, the CEMAC Court of Justice, and the Regional Competition Council. CEMAC has introduced a mandatory merger control regime. Although the CEMAC competition authority is not yet fully operational, it is starting to accept merger notifications.

26. Several CEMAC countries do not yet have competition laws or authorities, such as the Central African Republic, Chad, Gabon and Equatorial Guinea. There is also some overlapping membership with the Economic Community of Central African States.

1.6 Economic Community of Central African States (ECCAS)

27. ECCAS is an economic community established for the purpose of promoting regional economic cooperation in central Africa.⁵⁴ Article 6 of the 1992 Treaty establishing ECCAS indicates the creation of a free trade area and a customs union in twenty years.⁵⁵ Regional competition policy is the least developed in the ECCAS. It does not provide for any regional framework or harmonising dynamic for its members competition laws.

IV. Options for harmonising competition law in Africa

28. Given the challenges of overlapping membership, the diverse stages of development in domestic competition regimes and the variable geometry of the RECs, it is useful to identify the main approaches to harmonising domestic competition laws and policies. The strongest option is full integration or unification of competition law, and is typically based on the EU experience. Such an approach has been followed in WAEMU, COMESA and EAC. It includes the establishment of a nearly complete continental competition policy or code, along with a supranational enforcement agency that deals with cross-border anti-competitive practices. At present, the institutional framework for variable geometry provided by the Abuja Treaty and the AfCFTA does not promulgate this option. For despite the advances made in some of the RECs, it does not correspond to the context of the African continent. Member countries belonging to RECs such as CEMAC, SACU or the ECCAS have not agreed to develop and enforce competition laws either regionally or domestically.

29. The second approach entails no continental level law, but rather a policy of harmonising national competition laws incrementally through bottom-up convergence. This can be achieved through cross-fertilisation or convergence of national law or enforcement agency cooperation, complemented by sectoral agreements. This approach produces a bilateral type of harmonisation,

48 Member States of SADC are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe.

49 The 2015 Consolidated Treaty of the Southern African Development Community incorporates: the Treaty of the Southern African Development Community, 1992 and subsequent Amendments to the Treaty.

50 The SADC Protocol on Trade (2006), amended 2010, Article 25.

51 The SADC Declaration on Regional Cooperation in Competition and Consumer Policies (2009).

52 The Treaty Establishing the Economic Community of Central African States, Article 28(5). Its members are: Gabon, Cameroon, the Central African Republic, Chad, the Republic of the Congo and Equatorial Guinea.

53 CEMAC Regulation No. 1/99/UEAC-CM-639 of 25 June 1999 on Abuse of Dominance and Monopoly.

54 The Member States of ECCAS are: Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Rwanda, São Tomé and Príncipe.

55 The Treaty Establishing the Economic Community of Central African States (1992).

based on shared principles. It can involve the concept of outbound extraterritoriality through which national law can cover foreign actors that hurt the regulating nation's firms, and also nationals of the regulating nation that hurt foreigners. However, in the African context, this approach is less relevant for integrating those countries with more nascent competition norms and enforcement systems. It does not take advantage of the more advanced RECs in converging competition principles between COMESA, EAC and WAEMU, to more effectively underpin cross border trade liberalisation.

30. The third approach focuses on developing and integrating competition regimes using continental wide minimum standard competition principles and strengthen cooperation between competition authorities. This leads to tripartite-like arrangements that link principles of a constitutional dimension that prohibit anti-competitive blockages of market access and transnational cartels, and provide a discipline for unjustified government trade-restraining acts. Under this approach, states would be required to prohibit the few consensus wrongs domestically. This approach seems most relevant for the AfCFTA. The Protocol on Competition could provide clear guidance on implementing these principles along common lines among the RECs and State Parties. The Protocol could focus on those matters of principle in the State Parties or RECs that are currently incompatible, or run contrary to AEC trade policies. For example, the time periods for pre-merger notification filings can be harmonised. Countries and RECs can agree to accept pre-merger filings prepared for the first jurisdiction in which a filing is made, with supplements as necessary to cover different markets. Stronger cooperation can also be required among agencies when investigating anti-competitive conduct. Under this approach, the RECs both to support the State Parties and implement top-down African Union guidance on cross-border competition issues. This serves to ensure that the different competition strategies of individual states are brought into alignment by the integrating role of the RECs. The AfCFTA's two-tier system is compatible with this third approach. It can provide direction on harmonising minimum competition principles among RECs to reduce the variable geometry in their competition regimes, and also integrate diverse countries with overlapping membership.

31. One legal obstacle here is that while the AfCFTA is an element of the AU structures and programmes, it is not endowed with a legal personality. Instead, under AfCFTA Article 13(3), the Secretariat is provided with *sui generis* personality features, as a functionally autonomous institutional body within the African Union system with an independent legal personality. Yet, the rights and duties of the Secretariat are not specified in the AfCFTA and there are no precedents in the AU system to indicate the sort of independent legal powers the Secretariat will enjoy.⁵⁶ These need clarification through Council of Ministers' decisions adopted under

Article 13.⁵⁷ An effective AfCFTA Secretariat would provide an AU level focal point for cooperating with the RECs to find consensus on convergence towards similar competition principles and the minimum standards appropriate for the individual members.

32. Another challenge lies in the decision-making structure of AfCFTA institutions. Article 9 of the AfCFTA establishes the Assembly, Council of Ministers, Committee of Senior Trade Officials as well as the Secretariat.⁵⁸ The Assembly is the highest decision-making organ, with the exclusive authority to adopt interpretations of the Agreement.⁵⁹ A Council of Ministers supports and is responsible to the Assembly.⁶⁰ Although all the AU Member States participate in the Council of Ministers, there is no formal role for the RECs. The Council can make decisions within its mandate that are binding on the State Parties.⁶¹ However, only State Parties are represented in the AfCFTA Council—again, not the RECs. The Committee of Senior Trade Officials⁶² consists of officials designated by each State Party to implement Council of Ministers' decisions. Here the RECs are represented, but only in an advisory capacity. This leaves open how strong this representational function will be.

33. The lack of formal REC participation in decision-making processes undermines their role as building blocks for integration and harmonising African countries' competition laws. The AU framework needs to harness the RECs to inform the institutional decision-making processes. The expertise of the RECs is vital as some African countries are not participating in some of the Phase II competition negotiations. Lack of participation by both countries and the RECs detracts from effective coordination of diverse national and regional strategies on cross-border competition law and enforcement issues. In the area of competition, enforcement is often a greater problem than establishing laws. Without credible enforcement mechanisms, the incentives for governments to prevent unfair business practices are reduced. In the event of disputes between the parties under the AfCFTA, the Protocol on Rules and Procedures on the Settlement of Disputes provides a detailed legal instrument to address disputes regarding the interpretation and/or application of the Agreement in relation to their rights and obligations.⁶³ However, the Protocol does not provide jurisdiction over AU legal instruments, which includes the Protocol on Competition.

⁵⁶ G. Erasmus, *The AfCFTA Institutions: Could the Secretariat Hold the Key to Implementation* (2019), *tralac Working Paper* US19WP01, 6.

⁵⁷ The African Continental Free Trade Agreement, Article 13.

⁵⁸ *Ibid.*, Article 9: Institutional Framework for the Implementation of the AfCFTA.

⁵⁹ *Ibid.*, Article 10: The Assembly.

⁶⁰ *Ibid.*, Article 11: The Composition and Functions of the Council of Ministers.

⁶¹ *Ibid.*, Article 11.5: "Decisions that have legal, structural or financial implications shall [only] be binding on State Parties upon their adoption by the Assembly."

⁶² *Ibid.*, Article 12.

⁶³ *Ibid.*, Protocol on Rules and Procedures on the Settlement of Disputes, Article 1.

34. Additional legal instruments are required to offer further clarity and guidance on competition law and enforcement issues. This requires a legal committee specifically charged with the responsibility of drawing up legal texts for the several protocols under the Treaty, or for advancing cooperation with regard to the development of trade law and commercial practices within the community. However, this is not provided for under Article 25 Abuja Treaty dealing with the establishment of specialised technical committees.⁶⁴ Yet such a competition committee could provide the necessary harmonising impetus by preparing studies and recommendations on challenges in the process of harmonisation and unification, preparation of model laws and uniform laws, promotion of the codification and wider acceptance of competition terms, customs and principles and the promotion of their uniform interpretation and application. It would establish a common platform for consulting Member States and the RECs when harmonising and implementing competition policy under the AfCFTA.

V. Conclusions

35. This article has presented the benefits and challenges of harmonising competition law under the AfCFTA. The task for the AU is to promulgate minimum requirement competition principles that can build upon the achievements of established regional competition regimes, while harmonising the actions of diverse State Parties. Such a framework requires the effective participation of both the RECs and the members in the various AU and AfCFTA institutional and decision-making bodies relevant to competition issues.

36. The forthcoming Protocol on Competition will be central for ensuring an effective role for the RECs in pushing harmonisation of minimum requirement competition principles both between and within their respective competition regimes. It can mitigate the fact that the RECs do not have the legal standing to represent themselves in AfCFTA and AU decision-making structures on trade and competition matters. The Protocol can similarly advance cooperation through establishing specialised technical committees. This will also allow for the codification and wider acceptance of regional competition terms, customs and practices and a uniform interpretation, application and enforcement of principles. Both political will and legal role of AU institutions and instruments are crucial to this endeavour. The AU cannot rely on an incremental bottom-up harmonisation process. This will face resistance from domestic vested interests and lag too far behind the integration of trade taking place across the continent. For implementing continent-wide trade liberalisation policies without the necessary competition rules to address cross-border anti-competitive practices can frustrate the benefits to be reaped from the AfCFTA. ■

⁶⁴ A. Olufemi, *African Union Law: The Emergence of a Sui Generis Legal Order* (n. 4) 71.

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